Supreme Court, U.S.
FILED
JUN 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-14
No. 89-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Respondent,

v.

ROBERT BRUCE RECKMEYER,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM B. MOFFITT
LISA BONDAREFF KEMLER
William B. Moffitt & Associates
317 South Patrick Street
Alexandria, Virginia 22314
(703) 684-7900

Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

Whether the district court erred by dismissing the petitioner's 28 U.S.C. Section 2255 Petition pursuant to Federal Rule of Civil Procedure 12(b)(6) by finding, without an evidentiary hearing, that the petitioner waived his Sixth Amendment right to conflict-free counsel?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	3

REASONS FOR GRANTING THE WRIT:

(1) THE DECISION BELOW GRANTING RESPONDENT'S FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) MOTION TO DISMISS PETITION FOR HABEAS CORPUS IS IN CONFLICT WITH WELL-ESTABLISHED PRECEDENT OF THIS COURT AND THAT OF OTHER FEDERAL COURTS IN THAT THE COURT FAILED TO RESOLVE ALL DOUBTS AND DRAW ALL INFERENCES IN FAVOR OF PETITIONER

Page

(2) THE DECISION BELOW GRANTING SUMMARY DISMISSAL OF PETITION FOR HAPBEAS CORPUS IS IN CONFLICT WITH WELL-ESTABLISHED PRECEDENT OF THIS COURT AND THAT OF OTHER FEDERAL COURTS IN THAT THE COURT FAILED TO APPLY THE APPROPRIATE STANDARD FOR DISMISSAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)(i.e., FAILED TO ESTABLISH BEYOND DOUBT THAT THERE WAS NO SET OF FACTS WHICH WOULD SUPPORT PETITIONER'S CLAIM)

(3) THE DECISION BELOW DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PRODEEDINGS AND CONFLICTS WITH THE WELL-ESTABLISHED PRECEDENT OF THIS COURT AND THAT OF THE OTHER FEDERAL COURTS IN THAT THE COURT, WITHOUT AN EVIDENTIARY HEARING, PRESUMED A WAIVER OF A FUNDAMENTAL CONSITITUIONAL RIGHT; THE SIXTH AMENDMENT RIGHT TO COUNSEL 29

Page

CONCLUSION 56

APPENDIX

Opinion of the Fourth Circuit Court of Appeals, Per Curium, affirming judgment of district court dismissing 28 U.S.C. Section 2255 petition, dated April 2, 1990, Appendix A

Opinion of the Fourth Circuit Court of Appeals denying Petition for Rehearing with Suggestion for Rehearing En Banc, dated June 1, 1990, Appendix B

TABLE OF AUTHORITIES

Cases

Abdul-Alim Amin v.
Univ. Life Ins. co. of Memphis,
706 F.2d 638 (5th Cir. 1983)..... 39

Adam v. Bain,
697 F.2d 1213 (4th Cir. 1982)..... 33

Boudeloche v. Grow Chemical
Coatings Corp., 728 F.2d 759
(5th Cir. 1984)..... 31

Brick v. Dominion Mortg. & Rlty.
Trust, 442 F.Supp. 283 (W.D. N.Y.
1977)..... 46

Brown v. Town of Allenstown,
648 F.Supp. 831 (D.N.H. 1986).32, 45-46

Carnley v. Cochran,
369 U.S. 506 (1962)..... 43

Code v. Montgomery,
725 F.2d 1321 (11th Cir. 1984)..... 38

Conley v. Gibson,
78 S.Ct. 992 (1957)..... 30

Cook & Nicole, Inc. v.
Plimsoll Club, 451 F.2d 505
(5th Cir. 1971)..... 32

Cuyler v. Sullivan,
100 S.Ct. 1708 (1980)..... 42

TABLE OF AUTHORITIES - CONTINUED

Estate of Bailey by Oare v.
County of York, 768 F.2d 1577
(3rd Cir. 1985)..... 46

Experimental Engineering v.
United Technologies, 614 F.2d
1244 (9th Cir. 1980)..... 39

Harwich v. Wainwright,
813 F.2d 1082
(11th Cir. 1987)..... 38

Hishon v. King,
467 U.S. 69 (1984)..... 30

H.J. Incorporated v.
Northwestern Bell Telephone Co.,
109 S.Ct. 2893 (1989).....29, 30

Innovative Digital Equipment v.
Quantum Technology,
597 F.Supp. 983 (N.D. Ohio 1984).32, 46

In Re Bryan,
645 F.2d 331 (5th Cir. 1981)..... 43

Intake Water Co. v. Yellowstone
River Compact Com'n.,
590 F.Supp 293 (D.Mont. 1983)..... 32

Jackam v. Hospital Corp. of
America Mideast, LTD., 800 F.2d
1577 (11th Cir. 1986).....31, 47

TABLE OF AUTHORITIES - CONTINUED

Johnson v. Estelle,
704 F.2d 232 (5th Cir. 1983)..... 37

Johnson v. Zerbst,
304 U.S. 458 (1938).....43, 51

Livolsi v. City of New Castle, PA.,
501 F.Supp. 1146 (W.D. PA 1980).... 45

Machibroda v. United States,
368 U.S. 487 (1962)..... 34

Manecke v. Sch. Bd. of Pinellas County, 553 F.Supp. 787 (MD F.L. 1982).....44, 45

Morgan v. DeRobertis,
582 F. Supp. 271 (N.D. IL. 1984)... 45

Powell v. Alabama,
287 U.S. 45 (1932)..... 51

Porter v. Wainwright,
805 F.2d 930 (11th Cir. 1986)..... 37

Rosenwald v. United States,
898 F.2d 585 (7th Cir. 1990).....35, 36

Scheuer v. Rhodes,
94 S.Ct (1974).....30, 39

Schneckloth v. Bustamonte,
93 S.Ct 2041 (1973)..... 42

TABLE OF AUTHORITIES - CONTINUED

Sosa v. Coleman,
646 F.2d 991 (5th Cir. (1981)....31, 47

Tele-communications of Key West
v. United States, 757 F.2d 1330
(C.A.D.C. 1985).....39, 44, 48

Thomas v. Zant,
697 F.2d 977 (11th Cir. 1983)..... 37

United States v. City of Redwood,
640 F.2d 963 (9th Cir. 1981).....32, 47

United States v. Giardino,
797 F.2d 30 (1st Cir. 1986)..... 34

United States v. Hearst,
638 F.2d 1190 (9th Cir. 1980)..... 34

United States v. Reckmeyer,
709 F.Supp. 691 (E.D. VA 1989)..... 1

United States v. Rich,
589 F.2d 1025 (10th Cir. 1978)..... 43

United States v. Young,
644 F.2d 1008 (4th Cir. 1981)..... 35

United States v. Ziegenhagen,
890 F.2d 937 (7th Cir. 1989)..... 36

Zuck v. State of Alabama,
588 F.2d 436 (5th Cir. 1979)..... 36

TABLE OF AUTHORITIES - CONTINUED

Constitution and Statutes

U.S. Const. amend VI.....passim

21 U.S.C. §848..... 3

26 U.S.C. §1706(1)..... 3

26 U.S.C. §5861(d)..... 3

26 U.S.C. §5872..... 3

28 U.S.C. §2255.....4-5, 28, 35

28 U.S.C. §1254(1)..... 2

Rules

31 C.F.R. 103..... 3

31 C.F.R. 23(a)..... 3

Fed.Rule Civ. Proc. Rule 12(b)(6)..passim

Miscellaneous

ABA Model Code of Professional Responsibility, DR 4-101(B)(2), (3), DR 5-101(A), DR 7-102(A) (7)(8)..... 51

TABLE OF AUTHORITIES - CONTINUED

ABA Standards for Crim. Justice
4-1.1, 4-1.6, 4-3.1, 4-3.3,
4-3.5, 4-3.7.....52-55

OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals is an unpublished opinion, and is reproduced in the appendix hereto, Appendix (hereinafter, "App.") A, infra.

The opinion of the Fourth Circuit Court of Appeals is an unpublished opinion, and is reproduced in the appendix hereto, Apendix B, infra.

The opinion of the United States District Court for the Estern District of Virginia, Alexandria Division, is reported at United States v. Reckmeyer 709 F.Supp. 691 (E.D. VA 1989).

JURISDICTION

The jurisdiction of this Court is

invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense. (Emphasis added).

STATEMENT

On March 13, 1985 the petitioner, Robert Bruce Reckmeyer, on the advice and at the urging of his attorney John McGuire Dowd, pleaded guilty to several felonies; the most serious of those charges, engaging in a continuing criminal enterprise ("C.C.E.") (21 U.S.C. Sec. 848), carried a minimum sentence of ten (10) years' imprisonment with no opportunity for parole.[1] The petitioner

---

1 The other counts included in the plea were unlawful possession and transportation of firearms (26 U.S.C. Secs. 5861 (d) and 5872); and unlawful currency transportation (31 C.F.R. 103, 23 (a)); and filing false income tax returns (26 U.S.C. Sec. 1706 (1)).

was sentenced to 17 years' imprisonment, later reduced to 14 years in a level one institution. He has served more than 5 years of this sentence. In April, 1983 the petitioner became the target of a grand jury investigation and retained John Dowd, a former United States Attorney and Chief of the District of Columbia Task Force on Drugs, to represent him. Dowd was then with the firm of Whitman and Ransom. At their first meeting Dowd informed the petitioner that he would require a $100,000 retainer before he would represent the petitioner. (R. Reckmeyer 9/24/85 p.4).[2] The petitioner

[2] The petitioner has provided specific citations to grand jury testimony as support for the petitioner's claim. The grand jury transcripts in their entirety were attached to the original Petition to Vacate Sentence Pursuant to 28 U.S.C.

agreed to pay Mr. Dowd the $100,000 up front with the understanding that the quoted amount would cover the entirety of Dowd's legal services. (R. Reckmeyer 9/24/85 p.4-5). Over a period of months, the petitioner paid Dowd approximately $100,000. (R. Reckmeyer 9/24/85 p.17).

Over the next two weeks at a series of meetings, the petitioner informed Dowd in candid and intricate detail the extent of his participation in criminal activity; in addition, the petitioner informed Dowd of the extent of his financial resources and their whereabouts, including deposits in foreign banks and other hidden assets. (R. Reckmeyer 2/25/87 p.10; T. Holloran

---

Section 2255 as Exhibit #1, which was filed in the district court.

2/25/87 p.12). After the petitioner revealed the explicit details of his financial condition and criminal activity, Dowd demanded $500,000 to proceed with the petitioner's defense. (R. Reckmeyer 9/24/85 p.12). Reckmeyer explained to Dowd that he could not pay that kind of money and account for its source to either the grand jury investigating him or the Internal Revenue Service. Still, Dowd, having full knowledge that the source of the $500,000 was from funds derived from the sale of marijuania, continued to pressure the petitioner for the funds under the threat that if the money was not forthcoming his representation would cease. (R. Reckmeyer 9/24/85 p.18).

During the summer of 1983, after Dowd had exhausted the initial $100,000 the petitioner had paid, Dowd pressed the petitioner for money--again threatening to withdraw if the petitioner did not make payment. The petitioner, frightened about the pending indictment, and concerned about the information Dowd now possessed--as well as the nearly $100,000 already paid--agreed to pay Dowd another $300,000 or $400,000. (R. Reckmeyer 9/24/85 p.16). The petitioner put his farm up for sale in September, 1983. However, at closing, the government seized petitioner's $195,000 in equity. (J. Meckley 12/15/86 p.29).

With the grand jury indictment growing ever nearer Dowd continued to pressure the petitioner to pay more money. As a

result, the petitioner reached into his undeclared funds to pay Dowd's legal fees. Dowd was fully aware of this situation. Finally, at Dowd's direction, the petitioner began purchasing cashier's checks in amounts less than $10,000, using false remitters, made payable to Dowd's law firm, Whitman and Ransom. (J.Meckley 12/15/86 p.34; M. Horton 9/10/85 p.17). An IRS subpoena of Whitman and Ransom records in August 1984 revealed that over 20 cashier's checks amounting to $97,000 were hand delivered to Dowd in this fashion. (J. Meckley 12/15/86 p.33).

After the petitioner had paid Dowd approximately $200,000, Dowd left Whitman and Ransom and joined the firm of Heron, Burchette, Ruckert and Rothwell in June

1984.[3] (J. Meckley 12/15/86 P.40). Dowd constantly pressed the petitioner for more money and again threatened to withdraw from the case. At Dowd's insistence the petitioner began delivering cashier's checks to Dowd at Heron, Burchette in the same fashion he had at Whitman and Ransom. (J. Meckley 12/15/86 p.38). The IRS investigation revealed that between June and September 1984 cashier's checks of another $120,000 had been delivered to Dowd. (J. Meckley 12/15/86 p.38). When the petitioner discovered that the government had gained access to the Whitman and Ransom records, he refused to

---

3 The IRS investigation revealed that when Dowd agreed to join the Heron, Burchette partnership, he also agreed to bring $840,000 in fees for that year. (J. Meckley 12/15/86 p.37).

continue the payments.

Dowd continued to pressure the petitioner on almost a daily basis to put as much money in the law firm's account as possible in case the petitioner was indicted. (R. Reckmeyer 9/24/85 p.39). Dowd, aware that the petitioner had undeclared funds in a bank in the Bahamas, suggested that the petitioner simply have the cash wired to the firm's account. (R. Reckmeyer 9/24/85 p.34). The petitioner, at Dowd's direction and with his full knowledge, arranged for his brother-in-law, Scott Johnson, to withdraw the money from the Bahamian bank and bring it back by boat, thus avoiding having to declare the money at Customs. (J. Meckley 12/15/86 p.8). Scott Johnson made approximately

six trips between February and August 1984. (R. Reckmeyer 9/24/85 p.34). Each time one of these trips was made, Dowd not only knew about the trip, but also knew the exact amount of money being brought back and that Scott Johnson was traveling under an alias. (R. Reckmeyer 9/24/85 p.31-34; S. Johnson 12/15/86 p.10).

On August 2, 1984, Scott Johnson was arrested upon entering Florida with almost $100,000 of cash concealed in a suit case; money that had been earmarked for Dowd. (J. Meckley 12/15/86 p.8; R. Reckmeyer 9/24/85 p.40, 2/24/87 p.15). Dowd was fully aware that the money Scott Johnson had been carrying was the money for Dowd. Dowd was also aware that Scott Johnson pleaded guilty to making a false statement

and to conspiracy to import marijuana. (T. Holloran 2/25/87 p.3; S. Johnson 12/15/86 p.10).

Undaunted by Scott Johnson's arrest and the grand jury investigation, Dowd continued to press the petitioner for more money. At the same time, the petitioner was faced with subpoenas for his personal and corporate records, as well as subpoenas to Dowd's former law firm, Whitman and Ransom, for the petitioner's payment records. (J. Meckley 12/15/86 p.8). Yet, when the petitioner questioned Dowd as to the potential effect of the cashier payment scheme on his upcoming indictment, Dowd told him not to worry because the government would carry the heavy burden of showing the money was

illegal. (R. Reckmeyer 2/24/87 p.11). The petitioner deferred to Dowd's advice.[4]

At Dowd's insistence for still more money, the petitioner took two trips to the Bahamas to withdraw money for Dowd. (J. Meckley 12/15/86 p.8; R. Reckmeyer 9/24/85 p.46). Again, Dowd was fully aware of where the money was coming from and the method by which it was being transported. (R. Reckmeyer 2/24/87 p.15). The petitioner expressed his concern to Mr. Dowd about using cashier's checks to deposit the money after the grand jury had successfully subpoenaed Whitman and

---

[4] The petitioner testified before the grand jury: "I was a neophyte as far as the law was concerned. John [Dowd] was a professional in my eyes then and I would say that I followed his instructions and his advice pretty much to the letter." (R 2/24/87 p. 34).

Ransom's records. (R. Reckmeyer 9/24/85 p.41). Dowd instructed the petitioner to make direct deposits of cash into Reckmeyer's client account with Dowd's firm and gave the petitioner deposit slips to use for that purpose. (J. Meckley 12/15/86 p.21; R. Reckmeyer 2/24/87 p.13). According to the IRS investigation, Reckmeyer paid another $62,500 to Dowd in this fashion. (J. Meckley 12/15/86 p.40). When it became clear to Dowd that the direct deposits would not go unnoticed, Dowd told Reckmeyer to go back to the old method of using cashier's checks. (R. Reckmeyer 9/24/87 p.48).

The petitioner was indicted on January 15, 1985 in a 48 count indictment. Included in the allegations was the charge

(Overt Act. No. 22) that the August 2, 1984 incident involving Scott Johnson was an act in furtherance of the conspiracy to possess and distribute marijuana. Dowd knew that the money found on Scott Johnson had nothing to do with the conspiracy but was actually money earmarked for him. (J. Meckley 12/15/86 p.8; P. Reckmeyer 2/24/87 p.19). Despite Dowd's obvious conflict of interest due to the personal stake he now had in the outcome of the case, Dowd continued to represent the petitioner. Dowd failed to apprise the petitioner that he had a conflict of interest so that the petitioner could make an informed decision whether to proceed with Mr. Dowd as his lawyer or waive his right to conflict-free counsel. In fact, by counseling the

petitioner and Scott Johnson to make trips to the Bahamas to bring back money to pay Dowd's fees, Dowd actually created evidence and witnesses, including Dowd himself, against the petitioner, regarding the substantial proceeds element of the C.C.E. charge.

After the petitioner was arrested, Dowd informed the petitioner that he could not continue to represent him. (R. Reckmeyer 2/24/87 p.33; P. Reckmeyer 2/24/87 p.27). Dowd explained that the government had a restraining order freezing the petitioner's assets; thus, prohibiting the petitioner from paying Dowd.[5] (J. Meckley

---

[5] That morning, after the petitioner had been arrested and the same day the restraining order was issued, Dowd instructed his firm's accounting department to transfer the $26,022 remaining in the petitioner's escrow

12/15/86 p.9). Two days later, Dowd returned to visit the petitioner and advised him that the restraining order could be circumvented if the petitioner made direct deposits into the firm's general account rather than into the petitioner's trust account. (R. Reckmeyer 9/24/87 p.52-53; P. Reckmeyer 2/24/87 p.27).

Lisa Stark, Dowd's associate, testified before the grand jury that, in January or February 1985 Dowd sent her to the jail to

---

account to the firm's general account. Dowd then issued a miscellaneous bill dated January 28, 1985 for legal services charged to the petitioner. The IRS investigation revealed that the escrow funds transferred did not match the charges indicated on the bill nor was the bill in the standard form usually issued by the firm. (J. Meckley 2/25/87 p. 5-10).

see the petitioner to go over his indictment. Per Dowd's instructions, Stark ask the petitioner "where it is". Though Stark testified that she did not know what the question meant, when she asked the petitioner he proceeded to draw a diagram which was later determined to be a map outlining cash and valuables the petitioner had buried on his property. Stark then delivered the diagram to Dowd who passed it on to Patricia Reckmeyer to retrieve the money and then deliver it to him in the form of cashier's checks. (L. Stark 3/25/86 p.10-11). As per Dowd's instructions, Tim Johnson, the petitioner's other brother-in-law, began to deliver cashier's checks to Dowd. (R. Reckmeyer 9/24/85 p.53). The IRS

investigation revealed that between February and March 1985 Dowd received $64,920 in violation of the restraining order. (J. Meckley 12/15/86 p.47).

In early 1985 Dowd moved to dismiss the indictment against the petitioner and his wife on the grounds that the prosecutor and two agents had viewed privileged materials in violation of a court order. Prior to the hearing on the Motion to Dismiss the Indictment, Dowd continued to press the petitioner and his wife for money, claiming that they owed him $130,000. (R. Reckmeyer 9/25/85 p.58). He insisted that it would cost another $200,000 for him to go to trial. (R. Reckmeyer 9/24/85 p.53). By this time the petitioner had invested almost $500,000 in

Dowd's representation (R. Reckmeyer 2/25/87 p.26); the petitioner was in jail, and had no more funds to pay either Dowd or to hire another attorney. In addition, Dowd and his associates had worked on the case for almost two years and, in the petitioner's mind at the time, no one else could handle the case with as much familiarity and preparation. (R. Reckmeyer 9/24/85 p.53).

The district court denied the Motion to Dismiss the Indictment on March 1, 1985. Although the denial of the Motion presented a meritorious issue on appeal, Dowd began advising the petitioner about pleading guilty. Dowd never discussed the merits of an appeal or even informed the petitioner of his right to appeal.

Soon thereafter, Dowd informed the petitioner that he had negotiated a plea with the government that would place a 20 year cap on sentencing, require forfeiture of all the petitioner's assets and full cooperation by the petitioner. In return, the government would verbally agree to recommend the minimum ten (10) year sentence on the C.C.E. charge. (R. Reckmeyer 2/25/87 p.12). Dowd prevailed upon the petitioner to waive all of his rights to trial and to appeal, and to accept the government's offer. The petitioner believed he had no choice but to accept the government's offer and, on March 13, 1985, the petitioner signed the plea agreement.

After the petitioner entered the plea agreement, he was subjected to extensive debriefings by the government. (R. Reckmeyer 9/24/85 p.58). When the government became dissatisfied with the information petitioner was providing and threatened to seek the maximum sentence against both the petitioner and his wife, the petitioner sought reassurance from Dowd that the government would recommend the minimum sentence as promised and that the petitioner's wife and family would not be left destitute after he forfeited the totality of his assets. (R. Reckmeyer 9/25/87 p.12-14). Dowd met with the government agents and discussed the petitioner's concerns; Dowd emerged from that meeting and told the petitioner that

the government had agreed to the proposal. Later Assistant United States Attorneys Tandy and Aronica personally approached the petitioner and affirmed that they had accepted the petitioner's proposal on the condition that the petitioner submit to a polygraph examination as to his assets. (J. Meckley 12/15/86 p.59). The petitioner agreed.

Dowd advised Reckmeyer, even though Reckmeyer had failed two polygraphs, that any information regarding the payment of Dowd's legal fees was attorney-client privileged information and should not be disclosed to the government. (R. Reckmeyer 9/24/85 p.59, 2/25/87 p.7-8). Again, the petitioner relied on Dowd's legal counsel.

On April 12, 1985, two weeks prior to the petitioner's sentencing, Scott Johnson appeared before the court for sentencing. In open court, Scott Johnson informed the court and the government that he had brought money into the United States from the Bahamas for the sole purpose of paying Dowd's legal fees on behalf of Robert Reckmeyer.

On April 26, 1989, the petitioner appeared for sentencing. The government did not bring the information learned at Scott Johnson's sentencing to the attention of the court or the petitioner. Instead, the government asked the court to sentence the petitioner to a substantial term of imprisonment in excess of the minimum sentence, pointing to the recent

trips to the Bahamas and recent attempts to raise money. In addition, the government cited the petitioner's failure to pass the two polygraph tests regarding the disposition of his assets. (Transcript of sentencing, p. 15)

After the petitioner was sentenced, the petitioner contacted the chief prosecutor and disclosed the facts surrounding his fee arrangement with Dowd and the substantial funds paid to Dowd. (J. Meckley 12/15/86 p.5). As a result of that disclosure, a grand jury was convened to investigate Dowd's violation of several federal laws, including inter alia conspiracy, currency violations, violations of court orders, and obstruction of justice.

On August 26, 1985, within two days of the completion of the first grand jury investigation revealing Dowd's illegal and unethical activity in the representation of the petitioner the prosecutor appeared before the court in a hearing on the petitioner's Rule 35 Motion to Reduce Sentence. She informed the court that the government had made a determination that the petitioner had fully complied with the terms of his plea agreement. She failed to inform the court of any of the information regarding Dowd that had been provided by Scott Johnson, the petitioner or the grand jury investigation. Several more grand juries were convened to investigate Dowd's activities in his representation of Robert Reckmeyer.

Though extensive evidence established Dowd's illegal and unethical conduct and the undeniable conflict of interest Dowd labored under in his representation of the petitioner, the government never presented an indictment to the grand jury. On April 26, 1988, exactly three years after the petitioner's sentencing, the Department of Justice sent a letter to the District of Columbia Bar charging that the grand jury investigation revealed that Dowd's conduct evidenced "a serious disregard for the legal system." To date, the Bar has taken no action against Dowd. The statute of limitations as to most, if not all, of Dowd's criminal conduct has now expired.

On June 24, 1988, the petitioner filed his Petition to vacate sentence pursuant

to 28 U.S.C. Section 2255 (hereinafter "2255 petition") in the United States District Court for the Eastern District of Virginia, Alexandria Division, in which he claimed that he was deprived of his Sixth Amendment right to conflict-free counsel. The district court, without an evidentiary hearing, granted the government's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the petitioner had waived his Sixth Amendment right to conflict-free counsel.

ARGUMENT

THE DISTRICT COURT IMPROPERLY DISMISSED THE PETITIONER'S SECTION 2255 PETITION FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 12(b) (6) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

I

In H.J. Incorporated v. Northwestern Bell Telephone Co., 109 S.Ct. 2893 (1989), this Court explicitly enunciated the standard for dismissal of a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[6] "[W]e may only affirm the dismissal of a complaint if it is clear that no relief can be granted under any state of facts that could be

---

[6] Hereinafter, Rule 12(b)(6), Federal Rules of Civil Procedure, will be referred to as "Rule 12(b)(6)."

proved consistent with the allegations." Id. at citing Hishon v. King, 467 U.S. 69, 73 (1984). As early as 1957, in Conley v. Gibson, 78 S.Ct. 992 (1957) this Court stated,"[i]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 102. (Emphasis added). See also Scheuer v. Rhodes, 94 S.Ct 1683, 1686 (1974) Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.")(Emphasis added).

The circuit courts have traditionally followed this Court's holdings with respect to dismissals pursuant to Rule 12(b)(6). See Jackam v. Hospital Corp. of America Mideast, LTD., 800 F.2d 1577, 1579 (11th Cir. 1986)(The "movant sustains a very high burden."); Boudeloche v. Grow Chemical Coatings Corp., 728 F.2d 759, 762 (5th Cir. 1984)(Motion to dismiss for failure to state a claim must be overruled even where "it appears almost a certainty to the court that the facts alleged cannot be proved to support the legal claim."); Sosa v. Coleman, 646 F.2d 991, 993 (11th Cir. 1981) (Emphasis added) ("Where the asserted theory of liability is extreme or even far fetched . . ., the more important it is that the conceptual

legal theories be explored and assayed in the light of actual facts, not a pleader's supposition."); United States v. City of Redwood, 640 F.2d 963 (9th Cir. 1981); and Cook & Nicole, Inc. v. Plimsoll Club, 451 F.2d 505 (5th Cir. 1971). Likewise, the federal district courts have ruled similarly. See Intake Water Co. v. Yellowstone River Compact Com'n, 590 F.Supp 293, 296 (D.Mont. 1983) ("The primary objective of the legal system is to obtain a determination on the merits, not a dismissal on pleadings rather than proof."); Brown v. Town of Allenstown, 648 F.Supp. 831, 834 (D.NH. 1986); and Innovative Digital Equipment v. Quantum Technology, 597 F.Supp. 983, 988 (N.D. OH

1984).[7]

As the aforesaid cases illustrate, even where the complaint alleges questionable, bizarre, far fetched or perhaps untenable theories of recovery, appellate courts have been unwilling to uphold Rule 12(b)(6) dismissals. The clear import of prior precedent until now has been that the plaintiff, even a plaintiff who has minimal chances of prevailing, must be given an opportunity to prove and argue his claim on the merits. This is particularly so where the ultimate

---

[7] Even the Fourth Circuit, until the case at bar, has held that "a complaint should not be dismissed unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." Adam v. Bain, 697 F.2d 1213, 1216 (4th Cir. 1982). (Emphasis added).

determination of relief is a factual one. Under such circumstances, a dismissal under Rule 12(b)(6) has been held, until now, to be erroneous.

Similarly, in Machibroda v. United States, 368 U.S. 487, 494 (1962), this Court emphasized that it is plain error to dismiss a 2255 petition without an evidentiary hearing where factual allegations are "related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light." The Ninth and First Circuits have followed this precedent. See United States v. Hearst, 638 F.2d 1190 (9th Cir. 1980) and United States v. Giardino, 797 F.2d 30, 32 (1st

Cir. 1986).[8]

Thus, the appropriate standard to be applied with respect to a dismissal pursuant to Rule 12(b)(6) in the context of a Section 2255 proceeding is as enunciated in Rosenwald v. United States, 898 F.2d 585, 588 (7th Cir. 1990):

> An evidentiary hearing should be granted when there are important issues of fact which were not adequately developed at trial, the failure to develop the facts was not due to the defendant's neglect or deliberate bypass, and the record

---

[8] Interesting enough, the Fourth Circuit in 1981 recognized that the same standard is applied in the context of a 2255 petition. See United States v. Young, 644 F.2d 1008 (4th Cir. 1981) ("Section 2255 of Title 28 U.S.C. provides that unless the record conclusively shows that the prisoner is entitled to no relief, the district court should conduct an evidentiary hearing and state its findings and conclusions.")(Emphasis added). In deciding the instant case, the Fourth Circuit has now departed from the recognized standard.

> does not conclusively demonstrate that the petitioner is entitled to no relief.

Both the Fifth and Eleventh Circuits, as well as the Fourth Circuit until the instant case, decided cases consistent with the holding in Rosenwald, supra. Where, as here, both a conflict of interest and waiver are at issue, the Seventh Circuit in United United States v. Ziegenhagen, 890 F.2d 937 (7th Cir. 1989), held the "[a]n actual conflict of interest between retained counsel and a represented party requires an evidentiary hearing to determine whether or not the represented party made a knowing and intelligent waiver of the conflict."(Emphasis added). Id. at 941, citing, Zuck v. State of Alabama, 588 F.2d 436, 440-41 (5th Cir.

1979). See generally Porter v. Wainwright, 805 F.2d 930, 935 (11th Cir. 1986) ("Without the benefit of an evidentiary hearing at any level, we could not conclude that the attorney's failure to present mitigating evidence was a tactical decision."); Thomas v. Zant, 697 F.2d 977, 982 (11th Cir. 1983)("State court finding that counsel's conduct was an apparently tactical decision is not entitled to deference where that determination was made in the absence of any direct evidence as to what trial counsel's strategy was and as to whether counsel's decision was reasonable."); Johnson v. Estelle, 704 F.2d 232, 239 n.5, 240 (5th Cir. 1983)(Whether abandoned defense was meritorious under the facts as

known was a matter of conjecture; "without impugning counsel's integrity or professionalism we must conclude that in the absence of a record the truth of this issue is undeterminable."); and Code v. Montgomery, 725 F.2d 1321 (11th Cir. 1984)(Where lower courts have not found facts necessary to a determination of ineffective assistance claim, court must remand for an evidentiary hearing.); and Harwich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987).

Until this case it had been likewise well-established by the prior precedent of this Court and other circuits that "in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state

a cause of action, the allegations of the complaint must be construed favorably to the pleader." Scheuer v. Rhodes, 94 S.Ct. at 1686. See also Abdul-Alim Amin v. Univ. Life Ins. Co. of Memphis, 706 F.2d 638, 640 (5th Cir. 1983)(The court "must accept as true all well pleaded facts in the complaint, and the complaint is to be liberally construed in favor of the plaintiff."); Experimental Engineering v. United Technologies, 614 F.2d 1244 (9th Cir. 1980); Tele-communications of Key West v. United States, 757 F.2d 1330, 1334-35 (C.A.D.C. 1985)("All factual doubts must be resolved and all inferences made in favor of plaintiff.").

In the instant case, despite finding on the pleadings that the attorney had an

actual conflict of interest and that the conflict adversely affected the representation, the Fourth Circuit held that the petitioner had waived his right to effective assistance of counsel. In discussing this purported waiver, the Fourth Circuit stated:

> [T]he only reasonable inference that can be drawn in logic from the facts alleged is that Reckmeyer must have realized that Dowd's private interests would best be served by a quick and summary disposition that minimized any risk of inquiry into his own criminal culpability. We need infer to Reckmeyer no sophisticated understanding of the law or legal tactics nor any special prescience about human nature to hold that he had to know that Dowd's private interest would best be served by a plea bargain, whether or not that best served

> Reckmeyer's. Because Reckmeyer inevitably understood and accepted the conflict of his interests with those of Dowd he therefore knowingly and voluntarily waived his right to conflict-free representation.

App. A, at 30-31. (Emphasis added).

From the very language utilized by the Fourth Circuit it is clear that the court impermissibly inferred knowlege on the part of the petitioner that the record in this matter simply will not support without an evidentiary hearing. What the petitioner "must have realized" or "had to know" or "inevitably understood and accepted" cannot even be surmised without an evidentiary hearing.

Here, most important, is the fact that the waiver which the Fourth Circuit has

inferred concerns a fundamental constitutional right; the Sixth Amendment right to counsel. The Sixth Amendment right to counsel embodies the right to "representation that is free of any actual conflict of interest with counsel." Cuyler v. Sullivan, 100 S.Ct. 1708, 1719 (1980). This Court has been forever vigilant where waivers of fundamental constitutional rights are concerned. Waiver of a fundamental constitutional right has never, before now, been presumed. See Schneckloth v. Bustamonte, 93 S.Ct 2041, 2055 (1973)(The constitution requires that every effort be made to ensure that a defendant in a criminal case had not unknowingly relinquished the basic protections that the Framers thought

indispensable to a fair trial."); Carnley v. Cochran, 369 U.S. 506, 514 (1962), citing Johnson v. Zerbst, 304 U.S. 464 (1938) ("Every reasonable presumption against the waiver of the right to counsel will be indulged, and acquiescence in the loss of the right to counsel will not be presumed."); In Re Bryan, 645 F.2d 331, 333 (5th Cir. 1981)("[P]urported waivers of fundamental constitutional guarantees are subject to the most stringent scrutiny . . . [b]ecause of the far-reaching consequences involved in a waiver of a basic right, courts indulge every reasonable presumption against waiver of a fundamental right"); and United States v. Rich, 589 F.2d 1025 (10th Cir. 1978).

Waiver has traditionally been held to be intrinsically bound to the facts of a given situation and, therefore, when considering dismissal pursuant to Rule 12(b)(6) under circumstances such as those present here, courts must scrupulously avoid making factual assumptions which appear reasonable or even obvious from the record. See Tele-communications of Key West v. United States, supra. See also, Manecke v. Sch. Bd. of Pinellas County, 553 F.Supp. 787 (M.D. FL. 1982).

Since all of the acts relevant to the adjudication of the petitioner's claims occurred outside of the courtroom, the record on the issue of waiver of the right to conflict-free counsel has not been sufficiently developed to permit the

appropriate application of Rule 12(b)(6). Several district courts have addressed the need for a full development of the facts when defenses such as waiver are at issue. See generally Morgan v. DeRobertis, 582 F. Supp. 271, 273 (N.D. IL. 1984) and Livolsi v. City of New Castle, PA., 501 F.Supp. 1146, 1151 (W.D. PA 1980)(The court held that resolution of the defenses of waiver, laches and estoppel "typically depends on a full development of the facts of the individual case.") Manecke v. Sch. Bd. of Pinellas County, Fla., 553 F.Supp. at 788. ("Waiver is an affirmative defense and involves factual determinations . . .," therefore, "the defendants waiver argument is an inappropriate basis for a dismissal under Rule 12 Fed. R. Civ. P."); Brown v.

Town of Allenstown, supra; Brick v. Dominion Mortg. & Rlty. Trust, 442 F.Supp. 283, 304 (W.D N.Y. 1977) ("Fraudulent scheme and whether plaintiff could or could not have discovered the alleged fraud sooner is a material issue of fact which cannot be determined on a motion to dismiss on which plaintiff's allegations must be accepted as true."); and Innovative Digital Equipment v. Quantum Technology, supra. The courts of appeals have similarly held that a hearing is necessary to fully develop the facts and, therefore, dismissal under Rule 12(b)(6) is not appropriate. See generally Estate of Bailey By Oare v. County of York, 768 F.2d 503, 511 (3rd Cir. 1985)("Ordinarily, proximate cause cannot be determined on

the basis of pleadings but instead requires a factual development at trial."); Jackam v. Hospital Corp of America Mideast, Ltd., 800 F.2d 1577 (11th Cir. 1986); Sosa v. Coleman, 646 F.2d 991 (5th Cir. 1981); and United States v. City of Redwood, 640 F.2d 963 (9th Cir. 1981).

Here, the Fourth Circuit's opinion conflicts with the well-established and accepted standard to be applied when considering dismissal pursuant to Rule 12(b)(6); that is:

> Dismissal for failure to state a claim for relief is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. All factual doubts must be resolved and all inferences made in favor of the plaintiff. Further, . . ., a Rule 12(b) (6) disposition must be made on the face of the complaint" . . . . For [the] court to affirm such a dismissal, it must be self-evident

> from the face of the complaint, resolving all doubts and drawing all inferences in favor of the plaintiff, that the plaintiff is not entitled to any relief . . . .

Tele-communications of Key West v. United States, 757 F.2d at 1334-35. (Emphasis added).

Finally, and perhaps most importantly, the Fourth Circuit's opinion departs from the settled prohibition against the presumption of a constitutional right such as the Sixth Amendment right to conflict-free counsel. Summary adjudication of fundamental rights should not escape this Court's consideration particularly when such summary adjudication flies in the face of the precedent of this Court and the other federal circuits.

Perhaps the most troubling aspect of this case, and the one that must be considered and resolved by this Court, is the allocation of fault for the unethical and illegal conduct which arose in the context of the attorney - client relationship under scrutiny here. The district court and the Fourth Circuit allocated the fault in this case to the petitioner (a layman) without affording that layman his day in court. The appropriate allocation of fault in this case must lie with the attorney. To penalize the petitioner for merely following the advice of his attorney by not permitting the petitioner the opportunity to prove his case is to insulate the attorney and to punish the

layman. It is the attorney who has the responsibility to ethically guide the client through the difficult maze that a criminal charge presents.

Over 67 years ago this Court recognized and articulated both the power and the need of loyal counsel in directing an accused through the legal system. In the words of Justice Sutherland:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

> guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 69 (1932) See also Johnson v. Zerbst, 304 U.S. at 463.

The Model Code of Professional Responsibility and the American Bar Association Standards for Criminal Justice, which govern the conduct of attorneys who practice before the bar of this nation, outline the necessity of avoiding conflicts of interest which divide the attorney's loyalty and undermine attorney-client confidentiality and the effectiveness of counsel. See Model Code of Professional Responsibility DR 4-101(B)(2),(3), DR 5-101(A), DR 7-

102(A)(7)(8).

Violations of the American Bar Associations Standards for Criminal Justice disclosed by this case include, but are not limited to:

> Standard 4-1.1 Role of defense counsel
>
> (a) Counsel for the accused is an essential component of the administration of criminal justice . . . .
>
> (b) The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to law.
>
> (c) The defense lawyer, in common with all members of the bar, is subject to the standards of conduct stated in statutes, rules, decisions of the courts, and codes, canons, or other standards of professional conduct . . . .
>
> (d) It is unprofessional conduct for a lawyer to misrepresent matters of fact or law to the court.

(e) It is the duty of every lawyer to know the standards of professional conduct as defined in the codes and the canons of the legal profession and in this chapter. The functions and duties of defense counsel are governed by such standards whether defense counsel is assigned or privately retained.

(f) As used in the chapter, the term "unprofessional conduct" denotes conduct which, in either identical or similar language, is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are not intended as criteria for the judicial evaluation of alleged misconduct of counsel to determine the validity of a conviction. They <u>may</u> or may not be <u>relevant in such judicial evalution</u>, depending upon all the circumstances. (Emphasis added).

Standard 4-1.6 Clients interests paramount.

The duties of a lawyer to a client are to represent the client's legitimate interest, and <u>considerations of personal and professional advantage should not influence the lawyer's advice or performance</u>. (Emphasis added).

Standard 4-3.1 Estabishment of relationship.

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused. The lawyer should explain the necessity of full disclosure of all facts known to the client for an effective defense, and the lawyer should explain the necessity of full disclosure of all facts known to the client for an effective defense, and the lawyer should explain the obligation of confidentiality which makes privileged the accused's disclosures relating to the case.

Standard 4-3.3. Fees.

(c) It is unprofessional conduct for a lawyer to enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

Standard 4-3.5. Conflict of interest.

(a) At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him or her. (Emphasis added).

Standard 4-3.7. Advice and service on anticipated unlawful conduct.

(a) It is a lawyer's duty to advise a client to comply with the law, but the lawyer may advise concerning the meaning, scope, and validity of the law.

(b) It is unprofessional conduct for a lawyer to counsel a client in or knowingly assist a client to engage in conduct which the lawyer knows to be illegal or fraudulent. (Emphasis added).

When an attorney perverts his obligation by unethically counseling lawlessness, the allocation of fault to the client is unfair. As a matter of policy, it is of utmost importance that conduct, such as that exhibited by counsel here, not escape the scrutiny of the courts. Counsel's sole purpose for existence is to zealously represent the client within the bounds of the law, not

to create evidence or induce or counsel criminal conduct all in furtherance of a scheme to enrich himself. A summary disposition of a matter which raises the serious ethical and legal issues raised here requires an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals for the Fourth Circuit affirming the judgment of the district court dismissing the petitioner's 28 U.S.C. Section 2255 petition.

Respectfully submitted,

WILLIAM B. MOFFITT
LISA BONDAREFF KEMLER

WILLIAM B. MOFFITT &
ASSOCIATES

WILLIAM B. MOFFITT &
ASSOCIATES
317 S. Patrick Street
Alexandria, Va 22314
(703) 684-7900
Counsel for Petitioner
By: Lisa Bondareff Kemler

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, 10th & Constitution Aves., NW, Washington, D.C. 20530 and William Otis, Assistant United States Attorney, 1101 King Street, Suite 502, Alexandria, Virginia 22314 this 29th day of June, 1990, in compliance with Rule 28.4(a) and 28.5(b) of the Rules of the Supreme Court.

Lisa Bondareff Kemler
Lisa Bondareff Kemler
(Member of the Bar of the Supreme Court)

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 89-7598

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ROBERT BRUCE RECKMEYER,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T.S. Ellis III, District Judge. (CR-85-00180-A)

Submitted: December 3, 1986 - Decided April 2, 1990

APPENDIX A

Affirmed by unpublished opinion. Judge Phillips wrote the opinion, in which Chief Judge Ervin and Judge Chapman joined.

William Benjamin Moffitt, WILLIAM B. MOFFITT & ASSOCIATES, Alexandria, Virginia, for Appellant. William Graham Otis, Senior Litigation Counsel, Alexandria, Virginia, for Appellee. Attorney on brief; Lisa Bondareff Kemler, Kerry C. Connor, WILLIAM B. MOFFITT & ASSOCIATES, Alexandria, Virginia, for Appellant. Henry E. Hudson, United States Attorney, Alexandria, Virginia, for Appellee.

PER CURIAM:

This is an appeal by the United States from the district court's order suppressing the statements made by the defendant Robert Bruce Reckmeyer, a federal prisoner convicted on a guilty plea to four felony counts of a multi-count drug conspiracy indictment, appeals from the order of the district court dismissing his petition under 28 U.S.C. § 2255 to vacate sentence. Reckmeyer alleged that misconduct on the part of his

attorney created a conflict of interest that deprived him of his fifth and sixth amendment rights to effective, conflict-free counsel. The district court granted the government's motion to dismiss the petition on the basis that even if the allegations of a prejudicial conflict of interest were true, Reckmeyer had waived the right to conflict-free counsel. We agree, and affirm.

I.

Disposition of this case turns on the facts alleged in Reckmeyer's petition, which, for purposes of this appeal, we accept as true.[1] In April 1983, Reckmeyer

---

[1] Reckmeyer appeals the district court's grant of the government's Fed. R. Civ. P. 12(b) (6) motion to dismiss for failure to state a claim upon which relief can be granted. In this posture, the district court accepted Reckmeyer's version of the facts alleged in his

learned that he was the target of a grand jury investigating narcotics trafficking. He retained John M. Dowd as counsel. From that time forward until Reckmeyer pled guilty and was sentenced in March 1985 on four charges arising from a conspiracy to possess and distribute marijuana and hashish, Reckmeyer's version of Dowd's representation is a tale of coercion, fee gouging, ethical violation, and illegality. Reckmeyer's petition charges that Dowd's personal knowledge of facts underlying the government's indictment and additional crimes committed to obtain funds to pay Dowd's fees created an actual conflict of interest that deprived Reckmeyer of his constitutional right to

---

petition as true. See 709 F. Supp. 680, 681-82 (E.D. Va. 1989).

effective counsel.

At their first meeting, Dowd indicated that he would require a $100,000 retainer to represent Reckmeyer. Reckmeyer alleged that he raised $90,000 from legitimate sources and paid that amount to Dowd. He then confided the details of his criminal involvement and his financial holdings to Dowd. Dowd soon informed Reckmeyer that he would need $500,000 to defend him. Reckmeyer at that point sought the advice of a family attorney. As reported in his testimony before a grand jury investigating possible criminal conduct by Dowd:[2]

---

[2] The grand jury testimony was submitted with Reckmeyer's § 2255 petition and was considered by the district court in ruling on the government's motion to dismiss. See 709 F. Supp. at 691 n.13; see also 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1357, at

I told [the family attorney] that I was under, let me back up, told him that there was a Grand Jury sitting, investigating me and my marijuana activities and that I had talked to a lawyer by the name of John Dowd. I explained to him who had suggested that I go see Dowd.

I explained to him that I had told John Dowd about all my involvement, even though I didn't discuss my involvement with [the family attorney]. I told him that I was free and candid with John Dowd. I told him that the first day that he told me that 100,000 would be, that he could handle my case for 100,000. I told him that after two weeks of discussing the, my involvement with the business and the amount of money that I had made, that he had reassessed his fee and was now wanting 500,000 up front.

Q. What was [his] advice to you?

A. He told me that for money like that I could hire Edward Bennett Williams and that I should consider someone else; or, if I was gonna stay with Dowd that I should consider a pay-as-you-go basis and

---

593 (1969) [hereinafter Wright & Miller] (court may properly consider exhibits attached to complaint in determining whether to grant Rule 12(b)(6) motion). Reckmeyer gave testimony before a grand jury investigating possible criminal conduct by John Dowd.

just get a monthly invoice for services rendered.

And that I asked him if he would check into John Dowd and see if he was competent and reputable.

* * *

Q. And did he report to you that Mr. Dowd was, in fact, reputable and competent?

A. He did.

Joint Appendix (J.A.) at 1042-43.

Reckmeyer decided to retain Dowd as his attorney, though he made clear that any additional payments would come from the profits of his illegal operations.[3] Dowd nevertheless continued to demand the large fee payments and threatened to withdraw

---

[3] The financial transactions in this case predate the Money Laundering Control Act of 1986. See 18 U.S.C. § 1956. The Act proscribes the laundering of monetary instruments, "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity." Id. § 1965(a)(1).

from the representation if Reckmeyer did not make the demanded payments. Reckmeyer suggested and then implemented a scheme in which he paid Dowd with cashier's checks purchased in a false name. This plan continued after Dowd switched law firms, but Reckmeyer became concerned when the records from Dowd's former firm were subpoenaed. Dowd suggested cash payments, but that plan was quickly discarded and the use of cashier's checks with false names resumed. Reckmeyer kept the amount of each check below $10,000, ostensibly to avoid federal reporting requirements. Id. at 1409.[4]

Much of Reckmeyer's illegal income was in banks in the Bahamas and he so informed

---

[4] See 31 U.S.C. § 5313(a).

Dowd. Dowd, fearing that Reckmeyer would be indicted and prohibited from transferring money out of the Bahamas, continued to press for payments with full knowledge that the funds would have to be smuggled into the country. Reckmeyer also knew that because the money was from illegal operations, it could not be disclosed upon entry into this country. Id. at 1061.[5] Reckmeyer arranged to have one of his brothers-in-law smuggle funds from banks in the Bahamas into the United States. After several successful smuggling trips, Reckmeyer's brother-in-law was arrested carrying illegal funds into this country. Reckmeyer then made

---

[5] See generally 31 U.S.C. §§ 5316, 5317 (currency importation reporting and forfeiture provisions).

two trips to the Bahamas and with Dowd's knowledge and approval withdrew funds from his Bahamian bank accounts, smuggled the funds back into this country without filing the required federal reports, and used the funds to pay Dowd.

Reckmeyer was indicted along with twenty-four other named co-conspirators in January 1985. He was charged in twenty-four of the forty-eight counts of the indictment with a variety of narcotics, weapons, and tax offenses. Among the charges, Reckmeyer was named in the lead drug conspiracy count under 18 U.S.C. § 846, and was accused of engaging in a continuing criminal enterprise (CCE) under 18 U.S.C. § 848. One of the overt acts identified in the indictment as part of the drug conspiracy was the interdicted

effort of Reckmeyer's brother-in-law to smuggle funds from the Bahamas into the United States. According to Reckmeyer, both he and Dowd were aware that the only use for the funds was to pay Dowd.

Reckmeyer was arrested and detained pursuant to government motions after the grand jury returned its indictment. . The district court also entered a restraining order freezing Reckmeyer's assets, which were subject to forfeiture, thus prohibiting payment to Dowd. At that point, Dowd told Reckmeyer that he would no longer represent him since he could not be paid. Two days later, Reckmeyer pleaded with Dowd to stay on the case, though, as he later testified to the Dowd grand jury, he felt devised a way to circumvent the restraining order and that

he would continue the representation if Reckmeyer could pay an additional $200,000. By this time, Reckmeyer alleges that he had already paid Dowd approximately $500,000, but he wanted to retain Dowd and agreed to follow Dowd's plan to pay more fees. Reckmeyer admitted that he paid Dowd approximately $40,000 in violation of the district court's restraining order.

The evidence against Reckmeyer was substantial, and Dowd advised him to plead guilty. Dowd negotiated a plea agreement with the government that required Reckmeyer to plead guilty to four counts, including the CCE charge, and called for a twenty-year sentencing cap.[6] Dowd

---

[6]Reckmeyer agreed to plead guilty to Count 2 of the indictment, engaging in a continuing criminal enterprise, see 18

allegedly told Reckmeyer that the government agreed to recommend the minimum possible sentence in exchange for Reckmeyer's full cooperation in disclosing and forfeiting the assets gained through illegal operations.[7] Reckmeyer also

---

U.S.C. § 5861(d); count 20, violating reporting requirements for the importation of money instruments, see 31 U.S.C. § 5316; and Count 40, filing false tax returns, see 26 U.S.C. § 7206.

[7]At the time, Reckmeyer faced a minimum ten year sentence on the CCE charge; then, as now, the maximum sentence on the CCE charge was life imprisonment. See 18 U.S.C. § 848.

Pursuant to the plea agreement, the government debriefed Reckmeyer. The government accused Reckmeyer of failing to disclose all of his assets and, according to Reckmeyer, Dowd joined the government agents in chastising him for dissembling. Dowd allegedly did tell Reckmeyer to involve attorney-client privilege when he was asked about attorney's fees he paid to Dowd.

alleged that Dowd negotiated a "side-deal" outside the plea agreement that required the government to provide a monthly stipend for Reckmeyer's wife's living expenses. Reckmeyer accepted the plea agreement and appeared before the district court in March 1985 for a Rule 11 plea hearing. The government presented its case against Reckmeyer, and he agreed under oath that the government could have proved its case against him.[8] Reckmeyer confirmed that he was freely and voluntarily pleading guilty and that the plea agreement represented the entire agreement with the government. The court also asked whether he was satisfied with

---

[8] The government's case against Reckmeyer is detailed in the opinion below. See 709 F. Supp. at 682-83.

Dowd's representation, and Reckmeyer answered, "Very much so, Your Honor." J.A. at 219. The court accepted Reckmeyer's plea; he was sentenced to seventeen years imprisonment on the CCE charge, with concurrent sentences of two years for unlawful currency transportation, two years for unlawful possession of a firearm, and three years for filing false tax returns.

Soon after he was sentenced, Reckmeyer contacted new counsel, who advised him that Dowd had a conflict of interest and that the conflict could have affected Dowd's representation. On advice of counsel, Reckmeyer contacted the government's chief prosecutor and reported Dowd's alleged misdeeds. At least two grand juries investigated Dowd's

representation of Reckmeyer, but no criminal charges were brought as a result of the investigations.[9]

In June 1988, Reckmeyer filed a 28 U.S.C. § 2255 petition to vacate sentence alleging that Dowd's conflict of interest had deprived him of his constitutional right to counsel. He had earlier that year unsuccessfully sought disclosure of grand jury materials from the investigation of Dowd, but the district court in August 1988 ordered the government to provide Reckmeyer with the requested grand jury materials and he appended the grand jury testimony to his

---

[9] Reckmeyer also obtained new court-appointed counsel and successfully moved the district court, pursuant to Fed. R. Crim. P. 35, to reduce his sentence to fourteen years.

petition. The government responded to the petition and argued for dismissal on three substantive grounds: that Reckmeyer waived any ineffective assistance claim he might have by knowing participation in Dowd's alleged misdeeds, that no actual conflict of interest existed because Dowd's stake in the case was the same as Reckmeyer's and could best be served by working for Reckmeyer's acquittal, and that Reckmeyer was not prejudiced by any conflict that might have existed because he could not show that Dowd's representation was adversely affected. At a hearing on the petition, the district court questioned whether the government was challenging the factual basis of the petition or merely challenging its sufficiency to state a claim for relief.

At the court's suggestion, the government refiled a motion to dismiss, alleging the same substantive grounds, pursuant to Rule 12 of the Rules Governing Section 2255 Proceedings in the United States District Courts, see 28 U.S.C. foll. § 2255, and Fed. R. Civ. P. 12(b) (6).

The district court granted the government's motion to dismiss. The court stated that the motion to dismiss was properly before it and that the motion was "manifestly appropriate as a means of testing the legal sufficiency of [Reckmeyer's] petition." 709 F. Supp. at 682. No evidentiary hearing was necessary to determine the legal sufficiency of Reckmeyer's allegations. In this procedural posture, the court accepted Reckmeyer's allegations as true and looked

solely to the question whether the allegations stated a claim for constitutional relief.

The court ruled that an actual conflict of interest was alleged in that Dowd had entangled himself in the conduct charged against Reckmeyer to the point that Dowd "would choose a course of action to suit his own interests in avoiding criminal liability over a course of action most favorable to his client." Id. at 688 (citation omitted). Moreover, the petition sufficiently alleged an adverse impact on Dowd's representation in that he pressured Reckmeyer to plead guilty and effectively foreclose possible inquiry into Dowd's own criminal conduct. Id. at 689-90. The court held, however, that Reckmeyer had waived his right to

conflict-free counsel. Reckmeyer, and Dowd, knew that the fee payments were illegal and understood that they were violating federal currency laws. Further, Reckmeyer had become enough concerned early in Dowd's representation to inquire into his competence, reputation, and fee demands; having hired Dowd he could have fired him, especially after Dowd told him that he would no longer represent him without the ability to be paid. Finally, the court emphasized that Reckmeyer indicated under oath at the plea hearing that he was satisfied with Dowd's representation. Id. at 691-94. The court found persuasive the reasoning on similar facts in Bridges v. United States, 794 F.2d 1189 (7th Cir. 1986).

This appeal followed. Reckmeyer's

principal contention here is that an evidentiary hearing was required to determine whether he knowingly waived the right to conflict-free representation.

II.

In conducting § 2255 proceedings, district courts have discretion to apply the Federal Rules of Civil Procedure in appropriate circumstances.

> If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the . . . Federal Rules of Civil Procedure [if] appropriate, to motions filed under these rules.

28 U.S.C. foll. § 2255 (Rule 12, Rules Governing Section 2255 Proceedings); see also United States v. Frady, 456 U.S. 152, 166-68 n.15 (1982) (discussing discretionary use of federal civil and

criminal procedural rules in § 2255 proceeding). Here the district court entertained the government's Fed. R. Civ. P. 12(b) (6) motion to dismiss for failure to state a claim upon which relief can be granted. We agree that a district court may properly consider a Rule 12(b) (6) challenge to the legal sufficiency of a § 2255 petition.[10] Cf. Bond v. Procunier, 780 F.2d 461 (4th Cir. 1986) (dismissal of state prisoner's § 2254 petition for failure to state a claim under Fed. R.

---

[10] The government attached several exhibits, including affidavits, to its initial response to Reckmeyer's petition. These exhibits were not considered by the district court in ruling on the government's Rule 12(b) (6) motion to dismiss. See Fed. R. Civ. excluded by court, Rule 12(b) (6) motion must be treated as motion for summary judgment and disposed of as provided in Fed. R. Civ. P. 56).

Civ. P. 12(b) (6) affirmed).

Under familiar principles, on such a challenge the petition must be construed in the light most favorable to the petitioner, with its allegations taken as true, Wright & Miller, § 1357, at 594; see Battlefield Builders, Inc. v. Swango, 743 F.2d 1060, 1061-62 (4th Cir. 1984), and with all reasonable inferences drawn in favor of the petitioner. See Goldfarb v. Supreme Court of Virginia, 766 F.2d 859, 860 n.1 (4th Cir. 1985). Our review of the district court's legal ruling is de novo. Revene v. Charles County Comm'rs, 882 F.2d 870, 872 (4th Cir. 1989).

The following substantive principles control our review. A conflict of interest that prejudicially affects counsel's representation of a client may

violate the client's sixth amendment right to effective assistance of counsel; criminal defendants are entitled to the undivided loyalty of competent counsel. See Strickland v. Washington, 466 U.S. 668, 688 (1984); see also Cuyler v. Sullivan, 446 U.S. 335, 346 (1980). Prejudice under these circumstances is presumed only if "'an actual conflict of interest adversely affected [the] lawyer's performance.'" Strickland, 466 U.S. at 692 (quoting Cuyler, 446 U.S. at 348). In the guilty plea context, see Hill v. Lockhart, 474 U.S. 52, 58-59 (1985), a constitutional violation occurs if there is an actual conflict of interest that adversely affects the voluntariness of the guilty plea. See Thomas v. Foltz, 818 F.2d 476, 480 (6th Cir. 1987).

A criminal defendant may, however, waive the right to conflict-free representation, just as he may waive the right to any counsel. See Bridges, 794 F.2d at 1193; United States v. Garcia, 517 F.2d 272, 276 (5th Cir. 1975); see also Cuyler, 446 U.S. at 347 (attorney and client may "knowingly accept such risk of conflict as may exist"). Such a waiver, like the waiver of any constitutional right, must be "voluntarily, knowingly, and intelligently [made] with sufficient awareness of the relevant circumstances and likely consequences." Bridges, 794 F.2d at 1193. While the waiver of constitutional rights is never presumed, see, e.g., Marzullo v. Maryland, 561 F.2d 540, 546 (4th Cir. 1977), waiver may be found despite the lack of specific

knowledge of all the implications of the waiver, see Bridges, 794 F.2d at 1194 (citing United States exrel. Tonaldi v. Elrod, 716 F.2d 431, 438 (7th Cir. 1983)). The question of waiver is one of law for the court. See Brewer v. Williams, 430 U.S. 387, 397 n.4 (1977).

The district court ruled that on the facts as pleaded a conflict of interest existed between Reckmeyer and his attorney Dowd and that the conflict adversely affected Dowd's representation of his client. Reckmeyer alleged with specificity Dowd's knowing complicity in the payment of attorney's fees with funds generated from illegal operations, the illegal smuggling of currency into this country, and the direct violation of a court order freezing Reckmeyer's assets

and preventing payment of any additional fees to Dowd. Dowd allegedly also had independent personal knowledge that the currency smuggling attempt by Reckmeyer's brother-in-law in fact related not to the central conspiracy charged to his client but rather to the conspiracy to smuggle funds into this country to pay his fee. The money smuggled into the country was itself conceivably evidence of the substantial proceeds element of the CCE charge. See 21 U.S.C. § 848(c) (2) (B).

Reckmeyer then argues that the conflict manifested itself to his actual prejudice in Dowd's seeking, to the detriment of Reckmeyer, to minimize the risk of exposing his own misdeeds. Reckmeyer alleged that at the detention hearing Dowd failed to pursue aggressively on cross-

examination the circumstances of the arrest of Reckmeyer's brother-in-law. More significantly, he alleged that Dowd strongly advocated that Reckmeyer accept the plea bargain he had negotiated with the government and waive any right to appeal. According to Reckmeyer, Dowd discussed no other options once the motion to dismiss the indictment was denied by the district court. He encouraged Reckmeyer by allegedly securing verbal commitments from the government to recommend the minimum sentence and to pay a monthly stipend to Reckmeyer's wife for living expenses. And he pressured Reckmeyer to accept the plea bargain by demanding an additional $200,000 in fees to take the case to trial.

In the procedural posture of this case

we must accept these allegations as true, though many are hotly disputed. But even assuming that the facts alleged demonstrate a conflict of interest between Reckmeyer and Dowd that adversely affected Dowd's performance, see, e.g., Thomas v. Foltz, 818 F.2d at 482; Government of the Virgin Islands v. Zepp, 748 F.2d 125, 135-36 (3d Cir. 1984), we agree with the district court that the facts alleged also demonstrate as a matter of law a knowing waiver of the right to conflict-free representation. Reckmeyer has admitted full knowledge of Dowd's alleged misdeeds and there is no question he knew that some of their joint actions were illegal. Despite this knowledge, he chose to "rehire" Dowd even after the attorney dropped the representation upon learning

that he could not legally be paid. And at the Rule 11 hearing, Reckmeyer affirmed under oath that he was "very much" satisfied with Dowd's representation.

These facts plainly show that Reckmeyer must have known that Dowd was self-interested and that his self-interest could run counter to Reckmeyer's. They also show that knowing all this, Reckmeyer nevertheless decided to retain Dowd as counsel. Though Dowd obviously never explained that his interests were in conflict with Reckmeyer's in a way that might affect his representation, the only reasonable inference that can be drawn in logic from the facts alleged is that Reckmeyer must have realized that Dowd's private interests would best be served by a quick and summary disposition that

minimized any risk of inquiry into his own criminal culpability (if the facts be as alleged). We need infer to Reckmeyer no sophisticated understanding of the law or legal tactics nor any special prescience about human nature to hold that he had to know that Dowd's private interest would be best served by a plea bargain, whether or not that best served Reckmeyer's. Because Reckmeyer inevitably understood and accepted the conflict of his interests with those of Dowd he therefore knowingly and voluntarily waived his right to conflict-free representation. See Bridges, 794 F.2d at 1193-95 (waiver found where defendant aware of counsel's conflict of interest by virtue of his own complicity in conduct giving rise to conflict).

III.

We therefore agree with the district court that on the facts as pleaded REckmeyer knowingly and voluntarily waived his right to conflict-free representation by Dowd. To hold otherwise on the undisputed facts of record here would be to condone the knowing complicity of defendants in conflict-creating misconduct of their counsel while preserving as an anchor to windward the claim of a constitutional violation resulting from that misconduct. The constitution provides no such option in guaranteeing the right to the effective assistance of counsel.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 89-7598

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ROBERT BRUCE RECKMEYER,

Defendant - Appellant.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

Upon consideration of the appellee's motion to file late petition for rehearing with suggestion for rehearing in banc,

IT IS ORDERED that the motion is granted.

APPENDIX B

The appellant's petition for rehearing and suggestion for rehearing in banc, and motion for leave to file petition out of time were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the motion for leave to file petition out of time is granted and the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Ervin and Judge Chapman.

For the Court,

John M. Greacen
Clerk

Supreme Court, U.S.
FILED
AUG 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-14

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT BRUCE RECKMEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court properly dismissed petitioner's motion under 28 U.S.C. 2255 without holding an evidentiary hearing, after concluding that the files and records of the case conclusively showed that petitioner had waived his right to the effective assistance of counsel.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Adams v. *United States*, 317 U.S. 269 (1942)	8
Bridges v. *United States*, 794 F.2d 1189 (7th Cir. 1986)	8
Cuyler v. *Sullivan*, 446 U.S. 335 (1980)	8
Porter v. *Wainwright*, 805 F.2d 930 (11th Cir. 1986)	10
Rosenwald v. *United States*, 898 F.2d 585 (7th Cir. 1990)	9, 10
United States v. *Elrod*, 716 F.2d 431 (7th Cir. 1983)	9
United States v. *Ziegenhagen*, 890 F.2d 937 (7th Cir. 1989)	9, 10

Constitution and statutes:

U.S. Const. Amend. VI	8
21 U.S.C. 848	2
26 U.S.C. 5861(d)	2
26 U.S.C. 5871	2
26 U.S.C. 7206(1)	2
28 U.S.C. 2255	3, 8, 9
31 U.S.C. 5316	2

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-14

ROBERT BRUCE RECKMEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is unreported. The opinion of the district court is reported at 709 F. Supp. 680.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1990. A petition for rehearing was denied on June 1, 1990. Pet. App. 1b-2b. The petition for a writ of certiorari was filed on June 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the 1970s and early 1980s, petitioner operated a massive marijuana and hashish distribution enterprise in the Eastern District of Virginia. Petitioner's organization generated more than $25 million in gross receipts. Petitioner himself realized at least $4 million in profits. In January 1985, after a lengthy investigation, petitioner and 24 members of his organization were indicted on a variety of narcotics, weapons, and income tax offenses. Gov't C.A. Br. 3-7.

Before trial, the government reached a plea agreement with petitioner, who was represented by retained counsel John M. Dowd. Petitioner agreed to plead guilty to four counts: one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848, one count of unlawfully possessing firearms, in violation of 26 U.S.C. 5861(d) and 5871, one count of unlawfully transporting currency to a foreign country, in violation of 31 U.S.C. 5316, and one count of filing a false income tax return, in violation of 26 U.S.C. 7206(1). In exchange, the government agreed that petitioner would face a mandatory minimum sentence of 10 years' imprisonment and a maximum sentence of 20 years' imprisonment. The government also agreed to move to dismiss the remaining 20 counts against petitioner. In March 1985, after a thorough colloquy, the district court accepted petitioner's guilty plea. During that colloquy, the court asked petitioner if he was satisfied with Dowd's representation. Petitioner responded, "Very much so, your Honor." Gov't C.A. Br. 7.

After accepting the plea, the district court sentenced petitioner to a total of 17 years' imprisonment, which the court later reduced to 14 years' im-

prisonment. Petitioner did not appeal from that judgment. Gov't C.A. Br. 3.

2. In June 1988, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, alleging that Dowd had rendered ineffective assistance as a result of a conflict of interest. Petitioner asserted that "Dowd's personal knowledge of facts underlying the government's indictment and additional crimes committed to pay his fees created an actual conflict of interest that deprived [petitioner] of his constitutional right to effective counsel." Pet. App. 4a-5a.

According to petitioner, Dowd requested a $100,000 retainer when petitioner sought his services in April 1983 after learning of the grand jury's investigation. Petitioner initially paid Dowd $90,000. After petitioner fully explained "the details of his criminal involvement and his financial holdings," Dowd told petitioner "that he would need $500,000 to defend him." Pet. App. 5a.[1] Petitioner told Dowd that "any additional payments would come from profits of his illegal operations." *Id.* at 7. Dowd allegedly instructed petitioner to pay him from any avaliable source if petitioner wished to retain his services.

Over the next several months, according to petitioner, Dowd continued to press for payment and urged him to pay as much as he could before an indictment was returned. After petitioner told Dowd that he could obtain the needed cash only by smuggling the money into this country from the Bahamas,

---

[1] That fee prompted petitioner to seek the advice of a family attorney, who told him to consider retaining another attorney. At petitioner's request, the family attorney investigated Dowd's background. After the attorney reported back that Dowd was reputable and competent, petitioner decided to continue to retain him. Pet. App. 5a-7a.

Dowd allegedly told petitioner to send someone to do it. Petitioner arranged to have one of his relatives smuggle the cash to pay Dowd's fees.[2] He then paid Dowd through cashier's checks made out to fictitious persons and through direct cash deposits into the bank account of Dowd's firm. Dowd allegedly gave petitioner the necessary deposit slips. Pet. App. 7a-10a; Gov't C.A. Br. 10-11.

Dowd continued to represent petitioner after the indictment was returned in January 1985, even though one of the overt acts involved a smuggling attempt allegedly done to pay Dowd's fees. As a result of the indictment, the district court detained petitioner pending trial and entered an order freezing all of his assets. Dowd visited petitioner in jail. According to petitioner, Dowd said he would no longer represent petitioner, "since he could not be paid." Pet. App. 11a. Several days later, however, Dowd allegedly told petitioner that he could continue to represent petitioner if petitioner agreed to Dowd's plan to evade the court's restraining order. Petitioner agreed and, in violation of that order, later caused $40,000 in cashier's checks to be delivered to Dowd and his secretary. Thereafter, Dowd continued to represent petitioner, but also continued to threaten to withdraw if petitioner did not continue paying him. Pet. App. 11a-12a; Gov't C.A. Br. 12.

After moving unsuccessfully to dismiss the indictment, Dowd advised petitioner to plead guilty. Dowd negotiated a plea agreement with the government un-

---

[2] In August 1984, federal authorities arrested petitioner's brother-in-law as he was smuggling $100,000 into the United States. Pet. App. 9a; Gov't C.A. Br. 10-11. That episode was later charged as an overt act in the narcotics conspiracy count of petitioner's indictment.

der which petitioner would plead guilty to four felony counts and would face a maximum sentence of 20 years' imprisonment. According to petitioner, Dowd also "negotiated a 'side-deal' outside the plea agreement that required the government to provide a monthly stipend for [petitioner's] wife's living expenses." Pet. App. 14a.[3]

3. The district court dismissed petitioner's motion without holding an evidentiary hearing. 709 F. Supp. 680 (1989). As an initial matter, the court pointed out that petitioner

> is entitled to relief only if he demonstrates that his interest was in actual conflict with Dowd's, that this conflict had an adverse effect on Dowd's representation, and that he did not knowingly waive his right to conflict-free representation.

Id. at 688. Assuming petitioner's allegations to be true, the court concluded that Dowd represented petitioner in spite of a conflict of interest and that that conflict "had an adverse impact on Dowd's representation of petitioner." *Id.* at 691. Nevertheless, the court held that "undisputed record facts convincingly establish that petitioner waived his right to conflict-free counsel." *Ibid.*

The court found that, "[b]y petitioner's own admission, Dowd, over a two-year period, continuously pressured [him] to pay exorbitant fees and to do so

---

[3] After petitioner was sentenced, he spoke with another attorney. That attorney advised him that Dowd "had a conflict of interest and that the conflict could have affected [his] representation." Pet. App. 15a. Petitioner then contacted the United States Attorney's Office and reported his fee arrangements with Dowd. Petitioner's allegations were investigated, but no criminal charges were ever filed. *Id.* at 15a-16a.

by illegal means using funds derived from illegal activities, namely drug trafficking profits." 709 F. Supp. at 691. The court further found that there was no "doubt that petitioner fully knew and appreciated the criminal nature of the currency smuggling and the various fee payment schemes." *Ibid.* "[N]otwithstanding persistent and mounting demands for greater and greater fees," the court pointed out, "petitioner chose to keep Dowd as his counsel." *Ibid.* The court concluded that "[t]o contend, as petitioner does, that he had no choice is arrant nonsense." *Ibid.*

Furthermore, the court noted that shortly before trial, "when Dowd refused to continue the representation because he could not receive more fees, petitioner did not retain new counsel or ask for appointed counsel." 709 F. Supp. at 692. Instead, petitioner continued to retain Dowd after agreeing to the "new scheme designed to circumvent the court order preventing funds transfers." *Ibid.* In these circumstances, the court found, "petitioner must have meant what he said when, in response to the plea judge's inquiry on whether he was satisfied with Dowd's representation, he said, '[v]ery much so, your honor.'" *Ibid.* The court therefore reached the "inescapable conclusion * * * that petitioner 'knew what he was doing, voluntarily made his own choice, and misled the trial court in the process.'" *Ibid.* (quoting *Bridges* v. *United States*, 794 F.2d 1189, 1194 (7th Cir. 1986)).

4. The court of appeals affirmed. Pet. App. 1a-32a. It "assum[ed] that the facts alleged demonstrate a conflict of interest between [petitioner] and Dowd that adversely affected Dowd's performance." *Id.* at 29a. The court of appeals concluded, however,

that "the facts alleged also demonstrate as a matter of law [petitioner's] knowing waiver of the right to conflict-free representation." *Ibid.*

The court found that petitioner "has admitted full knowledge of Dowd's alleged misdeeds" and "there is no question he knew that some of their joint actions were illegal." Pet. App. 29a. Petitioner chose to "rehire" Dowd, "[d]espite this knowledge," even after Dowd "dropped the representation upon learning that he could not legally be paid." *Id.* at 29a-30a. The court determined that "[t]hese facts plainly show that [petitioner] must have known that Dowd was self-interested and that his self-interest could run counter to [petitioner's]" and "that knowing all this, [petitioner] nevertheless decided to retain Dowd as counsel." *Id.* at 30a. The court recognized that "Dowd obviously never explained that his interests were in conflict with [petitioner's] in a way that might affect his representation." *Ibid.* The court concluded, however, that

> the only reasonable inference that can be drawn in logic from the facts alleged is that [petitioner] must have realized that Dowd's private interest would best be served by a quick and summary disposition that minimized any risk of inquiry into his own criminal culpability (if the facts be as alleged).

Id. at 30a-31a. Accordingly, the court held that since petitioner "inevitably understood and accepted the conflict of his interests with those of Dowd he * * * knowingly and voluntarily waived his right to conflict-free representation." *Id.* at 31a.

ARGUMENT

Petitioner contends (Pet. 29-56) that the district court erred in dismissing his motion under 28 U.S.C. 2255, which alleged that his retained counsel had rendered ineffective assistance as a result of a conflict of interest, without first holding an evidentiary hearing. Petitioner's contention is quite narrow. He concedes that a defendant may waive his Sixth Amendment right to conflict-free representation, see *e.g.*, *Cuyler* v. *Sullivan*, 446 U.S. 335, 347 (1980); *United States* v. *Bridges*, 794 F.2d at 1193, and he does not dispute that a hearing is unnecessary where "the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U.S.C. 2255. Here, as both the district court and the court of appeals held, the record created by petitioner himself shows conclusively that he knowingly and voluntarily waived his Sixth Amendment right. In these circumstances, the courts below correctly concluded that an evidentiary hearing would have been superfluous.

According to petitioner's own account, during the two-year period that Dowd was retained he pressured petitioner repeatedly to pay hefty—if not exorbitant—fees through unlawful means, namely, using the ill-gotten profits from petitioner's drug trafficking activities. Moreover, petitioner conceded that he knew and appreciated the criminal nature of Dowd's alleged fee arrangement and the currency smuggling that made it possible. Despite these shadowy circumstances and Dowd's escalating fee demands, petitioner chose to keep Dowd as his counsel. Petitioner certainly knew "what he [was] doing and * * * made [his choice] with eyes open." *Adams* v. *United States*, 317 U.S. 269, 279 (1942).

In addition, having hired Dowd, petitioner undoubtedly "knew how to fire" him as well. *United States* v. *Elrod*, 716 F.2d 431, 439 (7th Cir. 1983). Indeed, even after a family attorney advised petitioner to consider hiring new counsel, petitioner chose to continue with Dowd as his counsel. And on the eve of trial, when Dowd once again threatened to withdraw, petitioner did not retain new counsel or seek court-appointed counsel. He chose instead to fall in with Dowd's new and unlawful scheme to circumvent the district court's order restraining the transfer of his assets. Finally, before entering his guilty plea, petitioner told the court that he was satisfied with Dowd's representation. 709 F. Supp. at 692.

On this record, it is inconceivable that petitioner did not know that "Dowd's private interests would be best served by a quick and summary disposition [of petitioner's case] that minimized any risk of inquiry into his own criminal culpability (if the facts be as alleged)." Pet. App. 30a-31a. This is precisely the sort of situation in which a defendant effectively waives his right to conflict-free representation. See, *e.g.*, *United States* v. *Bridges*, 794 F.2d at 1193-1195.[4] Accordingly, since "the files and records of the case conclusively show that [petitioner] is entitled to no relief," 28 U.S.C. 2255, the district court properly dismissed petitioner's motion to vacate his sentence without first holding an evidentiary hearing.[5]

---

[4] For that reason, petitioner errs in asserting that the courts below "allocated the fault in this case to [him] (a layman) without affording that layman his day in court." Pet. 49.

[5] Petitioner errs in relying (Pet. 35-37) on decisions such as *Rosenwald* v. *United States*, 898 F.2d 585 (7th Cir. 1990), *United States* v. *Ziegenhagen*, 890 F.2d 937 (7th Cir. 1989),

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS M. GANNON
Attorney

AUGUST 1990

---

and *Porter* v. *Wainwright*, 805 F.2d 930 (11th Cir. 1986). None of those decisions suggested—much less held—that a court must hold an evidentiary hearing before concluding that a defendant waived his right to conflict-free counsel. In *Rosenwald*, for example, a hearing was necessary because the record did not show whether the defendant was aware of his attorney's conflict of interest. 898 F.2d at 588; see also *Porter*, 805 F.2d at 939-940 (hearing needed to determine whether conflict of interest existed). Here, by contrast, there is no doubt that petitioner knew about—and accepted—Dowd's conflict of interest. In *Ziegenhagen*, the court of appeals remanded for an evidentiary hearing because, on the sparse record presented on the direct appeal, it could not "determine, without more, whether or not [the defendant] waived [his attorney's conflict of interest]." 890 F.2d at 941. In this case, however, the record shows conclusively that petitioner knowingly waived his right to conflict-free counsel.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20060